89- 1683

No. ___

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WATER POWER COMPANY, INC., ET AL.
Petitioners,

v.

PACIFICORP, ET AL.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

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QUESTION PRESENTED

Under the Public Utility Regulatory Policies Act of 1978 ("PURPA"), and contrary to this Court's decision in *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983), and other cases, may an electric utility do no more than *offer* to purchase power from a qualifying facility, utilizing a dispute with an interconnecting utility to avoid the PURPA purchase *obligation*?

PARTIES TO THE PROCEEDINGS

Petitioners before this Court, formerly petitioners before the Oregon Supreme Court, appellants before the Oregon Court of Appeals, and plaintiffs before the Circuit Court for Multnomah County are Water Power Company, Inc. and L.M. Baker, developers of small power resources. Bonneville Pacific Corporation has been a corporate parent of Water Power Company, Inc. through the ownership of Pacific Hydro, Inc., the interest in which now has passed in part to Hydro Energy Development Corporation, a wholly owned subsidiary of the Puget Sound Power & Light Company.

Respondent before this Court, formerly respondent before the Oregon Supreme Court and the Oregon Court of Appeals, and defendant before the Circuit Court for Multnomah County is PacifiCorp, the parent corporation of Pacific Power & Light Company, a public utility ("respondent"). Also a respondent before this Court, formerly respondent before the Oregon Supreme Court and the Oregon Court of Appeals, and third-party defendant before the Circuit Court for Multnomah County, is Douglas Electric Cooperative, an interconnecting utility.

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No. ___

IN THE

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OCTOBER TERM, 1989

WATER POWER COMPANY, INC., ET AL.

Petitioners,

v.

PACIFICORP, ET AL.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

Petitioners Water Power Company, Inc. and L.M. Baker respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Oregon Court of Appeals entered in the above-entitled proceeding on October 25, 1989.

OPINIONS BELOW

The opinion of the Oregon Court of Appeals is reported at 99 Or. App. 125, 781 P.2d 860, and is reprinted in the appendix hereto ("App.") at 2a. The memorandum

order of the Circuit Court for Multnomah County (Johnson, J.) is unreported, and is reprinted at App. 16a.

JURISDICTION

Petitioners filed an action in the Circuit Court of the State of Oregon for Multnomah County seeking injunctive relief and damages for respondent's breach of its agreement and statutory obligation under PURPA to purchase power from petitioners. On December 3, 1987, the circuit court entered judgment in favor of respondent. Petitioners appealed to the Oregon Court of Appeals on the ground, *inter alia*, that federal law (PURPA and regulations thereunder) imposes an obligation on respondent to purchase petitioners' electric power. On October 25, 1989, that court entered its opinion denying petitioners any relief. App. 2a. The Oregon Court of Appeals construed and applied PURPA, holding that respondent was not required to purchase power from petitioners. App. 9a. On November 29, 1989, petitioners petitioned for review by the Oregon Supreme Court. The Oregon Supreme Court denied the petition for review on January 25, 1990. App. 1a. The jurisdiction of this Court to review the judgment of the Oregon Court of Appeals is invoked under 28 U.S.C. § 1257(a).

PERTINENT STATUTORY PROVISIONS

Section 210(a) of PURPA provides in pertinent part:

(a) *Cogeneration and Small Power Production Rules.* [The Federal Energy Regulatory

> Commission ("FERC")] shall prescribe . . . such rules as it determines necessary to encourage cogeneration and small power production which rules require electric utilities to offer to –
>
> (1) sell electric energy to qualifying cogeneration facilities and qualifying small power production facilities and
>
> (2) purchase electric energy from such facilities. [16 U.S.C. § 824a-3.]

Section 292.301(b)(1) of FERC's responsive regulations provides in pertinent part:

> (b) *Negotiated rates or terms.* Nothing in this subpart:
>
> (1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart. [18 C.F.R. § 292.301(b)(1).]

Section 292.303(a) of FERC's regulations provides in pertinent part:

> (a) *Obligation to purchase from qualifying facilities.* Each electric utility *shall purchase,* in accordance with § 292.304, any energy and capacity which is made available from a qualifying facility:
>
> (1) Directly to the electric utility; or
>
> (2) Indirectly to the electric utility in accordance with paragraph (d) of this section. [18 C.F.R. § 292.303(a); emphasis supplied].

Section 292.304(b)(2) of FERC's regulations provides in pertinent part:

> (2) Subject to paragraph (b)(3) of this section, a rate for purchases satisfies the requirements of paragraph (a) of this section if the rate equals the avoided costs determined after consideration of the factors set forth in paragraph (e) of this section. [18 C.F.R. § 292.304(b)(2).]

Section 292.304(d) of FERC's regulations provides in pertinent part:

> (d) *Purchases "as available" or pursuant to a legally enforceable obligation.* Each qualifying facility shall have the option either:
>
> (1) To provide energy as the qualifying facility determines such energy to be available for such purchases, in which case the rates for such purchases shall be based on the purchasing utility's avoided costs calculated at the time of delivery; or
>
> (2) To provide energy or capacity pursuant to a legally enforceable obligation for the delivery of energy or capacity over a specified term, in which case the rates for such purchases shall, at the option of the qualifying facility exercised prior to the beginning of the specified term, be based on either: (i) The avoided costs calculated at the time of delivery; or (ii) The avoided costs calculated at the time the obligation is incurred. [18 C.F.R. § 292.304(d).]

STATEMENT OF THE CASE

Petitioners, Water Power Company, Inc. and L.M. Baker, are experienced developers of small power resources that have developed between 40 and 50 megawatts of small resource generation under the Public Utility Regulatory Policies Act of 1978 ("PURPA"). Tr. II, 369. Respondent PacifiCorp is a major public utility. Tr. V, 825. In reliance on federal and state regulations promulgated under PURPA, petitioners initiated efforts in 1982-83 to obtain a power purchase agreement from respondent at 1982 avoided cost prices, for a hydroelectric power project at Loon Lake, on Mill Creek, in Central Oregon. Tr. II, 370-71; IV, 623-24.

Although respondent initially had been aggressive in pursuing PURPA contracts, respondent knew by 1984 that the Pacific Northwest had a surplus of power. Tr. VI, 1072; VII, 1101. Respondent accordingly considered various avenues of escape from its purchase obligations under PURPA. For example, at a project review meeting in late 1983, respondent's staff outlined three alternatives in dealing with a deadline in a power purchase agreement for completion of a transmission agreement (which details how the small power producer will send power from its project to respondent's electric power grid): (1) to sit on the contract with the qualifying facility; (2) to make the purchase agreement conditional on another agreement; or (3) "refuse to sign and therefore kill the project." Tr. VIII, 1186-87; Ex 139.

To overcome respondent's resistance, petitioners enlisted the assistance of the Oregon Public Utility Commission ("PUC"). Tr. IV, 631-32. On August 31, 1984,

pursuant to the directive of the PUC over respondent's objections, the power purchase agreement was finalized without the execution of a transmission agreement. Tr. IV, 660. Petitioners accepted the PUC's proposal, reflected in Article II of the power purchase agreement, that the "Agreement shall be null and void" if a transmission agreement "has not been executed by all four parties prior to November 1, 1985." App. 6a.

On October 10, 1984, more than one year before the November 1, 1985, due date, Bonneville Power Administration ("Bonneville"), an interconnecting utility, distributed its draft transmission agreement, which was largely boilerplate, to petitioners, to respondent and to Douglas Electric Cooperative ("Douglas"). Tr. III, 500; IV, 667-69. Both Bonneville and Douglas were necessary to wheel (transmit) the power from petitioners' source to respondent's system. Petitioners and Douglas promptly found the draft transmission agreement acceptable. Tr. VIIA, 50; IV, 668. Respondent first responded eight months later in June 1985, and proposed numerous changes, including a change in the point of delivery from Cottage Grove (the point of delivery in the power purchase agreement) to Fairview. Tr. VI, 964-65. Petitioners immediately requested a meeting to resolve all of the proposed changes in the transmission agreement. Tr. IV, 692. Despite petitioners' accommodation of all of the proposed changes, respondent still refused to enter into the transmission agreement because of a dispute with Bonneville over arcane accounting issues. Tr. IV, 710-13. On October 7, 1985, the PUC directed final terms for the transmission agreement. Tr. IV, 723-24. Bonneville then rewrote it to accommodate alternative delivery points. Tr. IX, 1336.

By November 1, 1985, respondent had failed to sign the transmission agreement. Tr. VIIA, 88. Respondent thereupon repudiated the power purchase agreement, and petitioners filed this action in July, 1986. Petitioners' complaint alleged several theories of recovery, including breach of contract, violations of PURPA obligations, willful misconduct and gross negligence. The case was tried to a jury, which returned a verdict in favor of respondent. Judge Johnson, who prepared a written opinion, explained during the course of the trial that he was "not a federal judge" and was "not very interested in the federal law." Tr. I, 26.

On December 28, 1987, petitioners appealed the decision of the trial court to the Oregon Court of Appeals. The three-judge panel, in a unanimous opinion, held that PURPA "regulations and rules require a utility to *offer* to purchase power from a qualifying facility." App. 8a. (Original emphasis). The court accordingly found that respondent could insist on certain contractual provisions, such as a transmission agreement deadline and a particular point of delivery, even if enforcement of such provisions resulted in avoidance of respondent's purchase obligation. The court cited as authority 18 C.F.R. § 292.301(b), which permits the parties to a power purchase agreement to vary "terms and conditions relating to any purchase." In direct conflict with its holding, however, the court conceded in a footnote that "[a]n electric utility *must* purchase power from a small power producer." App. 4a. (Emphasis supplied). The Oregon Supreme Court denied the petition for review on January 25, 1990.

REASONS FOR GRANTING THE WRIT

PURPA encourages small power developers of renewable resources like petitioners by guaranteeing a market for their electric power. The practical effect of the decision below is to destroy the market for such power and thereby to blunt small power development. This Court should avoid such chilling consequences by requiring the court below to yield to this Court's precedent and the mandate of Congress.

I. The Court Below Misapplied This Court's Precedent And Sanctioned The Utility's Evasion Of Its Statutory Purchase Obligation.

Rejecting petitioners' argument that respondent had a statutory obligation to purchase electric power, the court below concluded that PURPA "statutes, regulations, and rules require a utility [merely] to *offer* to purchase power from a qualifying facility, which includes a small power producer." App. 8a. (Original emphasis). The Oregon Court of Appeals misconstrued and misapplied PURPA regulations, including 18 C.F.R. § 292.303(a), which plainly require a utility to do more than *offer* to purchase power: "Each electric utility *shall purchase*, in accordance with § 292.304, any energy and capacity which is made available from a qualifying facility." *Id.* (Emphasis supplied). This Court confirmed in *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 407 (1983), that 18 C.F.R. § 292.303(a) "provides that electric utilities *shall purchase* electricity made available by qualifying facilities." (Emphasis added).[1]

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[1] Commentators in the energy field uniformly have recognized a utility's purchase obligation. *See, e.g.*, Cole, Reviving

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The decision below, based on a patent misunderstanding of what PURPA regulations require, permits any utility to avoid its obligation to purchase power under PURPA by insisting on contractual devices that repudiate the contract. App. 7a, 8a, 11a. That is precisely what respondent did here. Respondent used protracted and dilatory disputes with an interconnecting utility, Bonneville Power Administration, to avoid signing the transmission agreement within the November 1, 1985, deadline. The decision of the court below encourages a utility to avoid its legally mandated obligation to purchase energy by squabbling with third parties long enough to trigger the expiry of a contractual deadline. The Oregon Court of Appeals cited as authority for this statutory dodge a single FERC regulation, 18 C.F.R. § 292.301,[2] but simultaneously misunderstood FERC

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the Federal Power Act's Comprehensive Plan Requirement: A History of Neglect and Prospects for the Future, 16 Env. Law 639, 647 (1986) ("PURPA provided for . . . guaranteed purchase of power"). *Cf.* Public Utilities Fortnightly 56 (Sept. 14, 1989) ("The law . . . also requires the local utility to buy cogeneration electricity. This is a *requirement.*") (Original emphasis). App. 37a. *See* White and Zack, Avoided Cost Pricing of Electricity From Waste-to-Energy Plants, Energy Policy 370 (Aug. 1989) ("PURPA marked a watershed in US energy policy by mandating private utilities to purchase electricity produced by small generators."). App. 32a.

[2] Section 292.301(b) permits negotiation by a "utility or any qualifying facility to agree to a rate *for any purchase,* or terms or conditions relating *to any purchase.*" (Emphasis added). Ironically, FERC recognized that a qualifying facility's ability "to negotiate with an electric utility is *buttressed* by the

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regulations to require a utility only to *offer* to purchase energy. The Oregon Court of Appeals' invitation to utilities to insist on contractual provisions that eviscerate their purchase obligations under PURPA is a sharp rebuff to this Court's decision in *American Paper Institute.*

In *American Paper Institute,* several electric utilities challenged two FERC rules, requiring electric utilities (1) to purchase electric energy from qualifying facilities at full avoided cost, 18 C.F.R. § 292.304(b)(2), and (2) to make such interconnections with qualifying facilities as are necessary to accomplish purchases or sales of electricity authorized by PURPA. 18 C.F.R. § 292.303(c)(1). The United States Court of Appeals for the District of Columbia Circuit invalidated the challenged FERC rules. 675 F.2d at 1226. This Court unanimously reversed. In addressing both issues, the Court repeatedly underscored that FERC regulations impose an obligation to *purchase.* The Court held that 18 C.F.R. § 292.304(b)(2) "requires a utility to purchase electricity from a qualifying facility at a rate equal to the utility's full avoided cost," 461 U.S. at 406, and that 18 C.F.R. § 292.303 "provides that electric utilities shall purchase electricity made available by qualifying facilities." *Id.* at 407.

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existence of the rights and protections of these rules." 45 Fed. Reg. 12,217 (1980) (emphasis added). Section 292.101(b)(2) defines "purchase" to mean "the purchase of electric energy or capacity or both from a qualifying facility by an electric utility." The regulations do not permit a utility to negotiate its way out of a purchase obligation, contrary to the legislative goals of PURPA.

Justice Marshall, writing for the Court, noted that it was "most unlikely that Congress could have intended that an evidentiary hearing be held for every interconnection necessary to consummate a purchase or sale of electricity" in that "these purchases and sales are in the public interest," and that development of small power production will promote energy conservation and efficient use of resources. 461 U.S. at 419-20. So too here, Congress did not intend to permit utilities to avoid purchases by insisting on contractual provisions that repudiate the contract. Yet the state court's sanctioning of contractual evasions illogically imputes to Congress " 'a purpose to paralyze with one hand what it sought to promote with the other.' " 461 U.S. at 421, *quoting Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947).

The Court's upholding in *American Paper Institute* of "such rules as are necessary to require purchases and sales" unmistakably conflicts with the holding of the court below. 461 U.S at 418. No purchase or sale can be consummated if the utility is permitted to employ contractual devices to prevent completion of a purchase or sale. The state court violated "the mandate of PURPA to encourage cogeneration and small power production [which] requires that obligations to purchase under this provision supersede contractual restrictions on a utility's ability to obtain energy or capacity from a qualifying facility." 45 Fed. Reg. 12,219 (1980). FERC has cautioned "that, in general, if it permitted such contractual provisions to override the obligation to purchase from qualifying facilities, these contractual devices might be used to

hinder the development of cogeneration and small power production." *Id.*[3]

The same reservations expressed by the Court in *American Paper Institute* with respect to affording an evidentiary hearing prior to interconnection apply with equal force here. Permitting a utility to use contractual ploys "would seriously impede the very development of cogeneration and small power production that Congress sought to facilitate." 461 U.S. at 420. Owners of qualifying facilities such as petitioners would have little incentive to purchase or sell electric energy if the utility could pull the rug from under their feet with impunity. *Id.*

Other state courts of last resort have held that the contractual device used by respondent in this case to avoid its purchase obligation is a violation of PURPA regulations. In *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 693 P.2d 427 (1984), a small power producer

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[3] Respondent may argue that petitioners are not prevented from selling power to respondent at 1990 prices. Congress intended PURPA to provide *incentives* to developers, however, so that their energy projects would be financially attractive. The project at issue in this case was viable to petitioners only at 1982 prices, which reached an historic high. Without the Court's intervention here, a prospective developer of alternative energy in 1992 will likely be discouraged, knowing that utilities later may avoid higher avoided costs by contractual devices when prices turn downward. The Oregon Court of Appeals earlier held that the PURPA obligation is to purchase at *present* avoided costs. *Snow Mountain Pine Co. v. Maudlin*, 84 Or. App. 590, 734 P.2d 1366, 1371, *rev. den.*, 303 Or. 591, 739 P.2d 571 (1987).

filed a complaint with the Idaho Public Utilities Commission ("IPUC") alleging that Idaho Power, an electric utility, intentionally and deliberately had protracted the negotiations for the purchase of power and had continuously employed tactics designed to discourage the project. 693 P.2d at 428. The complaint requested the IPUC to order Idaho Power to consummate its purchase of power. *Id.* Citing 18 C.F.R. § 292.303(a), the court found that the IPUC properly required the utility to purchase the small power producer's power. *Id.* at 431-32. *See also Bates Fabrics, Inc. v. Public Utilities Commission*, 447 A.2d 1211, 1213 (Me. 1982) ("utility shall purchase electricity at a price equal to the utility's 'avoided costs' ").

Three years prior to its decision for which certiorari is now sought, the Oregon Court of Appeals held that a utility's "obligation to purchase power is imposed by law on a utility; it is not voluntarily assumed." *Snow Mountain Pine Co. v. Maudlin*, 84 Or. App. 590, 734 P.2d 1366, 1370, *rev. den.*, 303 Or. 591, 739 P.2d 571 (1987). The court rejected the utility's argument that it was not obliged to purchase power until it had an executed power purchase agreement: "[The utility's] obligation is not governed by common law concepts of contract law; it is created by statutes, regulations, and administrative rules." *Id.*[4]

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[4] All lower state courts addressing the issue of a utility's purchase obligation under PURPA properly have followed *American Paper Institute. See, e.g., Lehigh Valley Power Committee v. Pennsylvania Public Utility Commission*, 563 A.2d 548, 552 (Pa. Cmwlth. 1989) ("utilities are required to purchase power from [qualifying facilities]"); *Long Island Lighting Co. v. Public Service Commission*, 137 A.D.2d 205, 529 N.Y.S.2d 209, 210, n.1 (1988)

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In spite of the precedent set by this Court, the court below refused to follow the law. As a result, petitioners were deprived of their federal statutory right to sell power to respondent at 1982 avoided cost prices. Under the circumstances, review by this Court is appropriate to reaffirm the principles ignored by the court below.

II. The Question Presented Is Important And Recurring.

Before PURPA, entities such as petitioners faced significant deterrents to engaging in small power production. Traditional electric utilities, customarily regarded and regulated by the states as natural monopolies, either refused to buy power from these nontraditional facilities, or offered unfairly low rates for such purchases. *FERC v. Mississippi*, 456 U.S. 742, 750 (1982). PURPA and regulations promulgated thereunder by FERC removed these stumbling blocks by guaranteeing a market for small power producers' power. 18 C.F.R. § 292.303(a). Shortly after PURPA's enactment, electric utilities unsuccessfully challenged the power of the federal government to require utilities to purchase power from small power producers. *See FERC v. Mississippi*, 456 U.S. 742 (1982); *American Paper Institute, Inc. v. American Electric Power*

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("PURPA required electric utilities to sell and purchase electric energy to and from [qualifying facilities]"). *See also Boyd v. PacifiCorp*, No. CV 87-414 (Umatilla County, Oregon, Circuit Court) ("if there is an obligation to furnish power there is an obligation not only to offer to buy it, but to buy it") (transcript excerpt reprinted at App. 23a).

Service Corp., 461 U.S. 402 (1983). The Oregon Court of Appeals now purports to replace those stumbling blocks.

The decision below, if permitted to stand, will mean that a regulated utility may flout with impunity the rules by which our society is governed, and thwart shortsightedly the development of alternative energy despite a looming electricity shortage. The primary sources of American law are those recorded rules of human behavior by which our society is governed. *Cf.* Pound, *Sources and Forms of Law*, 22 Notre Dame Lawyer 1, 47-48 (1946). These rules include a federal statute, PURPA, passed in 1978 by an optimistic Congress striving for a solution to America's energy problems. *FERC v. Mississippi*, 456 U.S. 742, 750 (1982). PURPA rules mandate (as this Court has confirmed) that "electric utilities *shall* purchase electricity made available by qualifying facilities." *American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 407 (1983). (Emphasis added). Our society enforces rules, or "commands," through our social institutions, including the executive branch, courts, and agencies. *Cf.* Radin, *Solving Problems by Statute*, 14 Oregon Law Review 90, 94 (1934). By insulating respondent from liability for its violation of these rules, the Oregon Court of Appeals' decision condones respondent's rending of the social fabric. Moreover, by implication, the Oregon Court of Appeals holds that a utility such as respondent, which receives a service monopoly in exchange for being subject to extensive state and federal controls, may employ contractual devices freely to avoid compliance with national energy policy.

Congress enacted PURPA in 1978 to decrease America's dependence on fossil fuels and to increase the development of renewable resources, including hydroelectric power. *FERC v. Mississippi*, 456 U.S. 742, 750 (1982). This is a paradoxical time for the energy industry because oil is cheap, gas is plentiful, and electricity is in surplus. *The Economist* 25 (Oct. 28, 1989). App. 24a. America is becoming increasingly dependent, however, on foreign oil. In 1988, for the first time, the United States got more than half of its oil from foreign sources (in 1973, during the Arab oil embargo, the United States was 33 percent dependent). *The New Republic* 13 (Nov. 27, 1989). App. 29a. FERC Commissioner Charles Trabandt recently wrote that because electrical demand projections are outstripping existing and planned capacity, the United States "is going to need every possible [megawatt] from responsible hydroelectric generation in the decades ahead" and should avoid "creating any further regulatory disincentive to future hydroelectric development." *Hydro Review* 8 (Feb. 1990) (excerpt from opinion in connection with license grant). App. 34a. There is a "looming shortage" of electricity, App. 26a, and unless alternative energy sources are properly encouraged, the problem will be back. App. 29a. Although utilities dislike the idea of being forced to accept electricity from others at a time of surplus, development of alternative energy sources is crucial to mitigate the coming "energy crunch of the 1990s." App. 27a.

By insulating respondent from liability for its violation of its obligation to purchase under PURPA, the Oregon Court of Appeals' decision undermines federal policies encouraging the development of decentralized

sources of renewable energy. Moreover, by implication, the Oregon Court of Appeals' decision places all consumers of energy (a category that includes all Americans) at the whim of large private utilities shortsightedly exercising their monopoly power.

CONCLUSION

For the reasons stated herein, the decision below is not simply an isolated rebuke of a federal statutory right. It is a dark harbinger of widespread refusal by utilities to buy power from qualifying facilities as required by PURPA. This Court accordingly should grant this petition for certiorari.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OREGON

WATER POWER CO INC Dba C-B HYDRO, INC BAKER, L M Dba SMALL SCALE HYDROPOWER Petitioners v. PACIFICORP Dba PACIFIC POWER & LIGHT CO Respondent DOUGLAS ELECTRIC COOPERATIVE	)	ORDER DENYING REVIEW CA A46977 SC S36710

The Court has considered the petition for review and ORDERS that it be denied.

DATE: JANUARY 25, 1990.

/s/ Edwin J. Peterson
EDWIN J. PETERSON
CHIEF JUSTICE

Van Hoomissen, J., not participating

COPIES TO:

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WALTERS, STEPHEN S Attorney for: Respondent
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APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF OREGON

WATER POWER COMPANY, INC., a Utah corporation, dba C-B HYDRO, INC. and L. M. BAKER, dba SMALL SCALE HYDROPOWER,

Appellants,

v.

PACIFICORP, a Maine corporation, dba PACIFIC POWER & LIGHT CO.,

Respondent,

v.

DOUGLAS ELECTRIC COOPERATIVE, an Oregon corporation,

Respondent.

(8607-04185; CA A46977)

FILED OCT 25 1989

Appeal from Circuit Court, Multnomah County.

Lee Johnson, Judge.

Argued and submitted March 13, 1989.

Arden E. Shenker, Portland, argued the cause for appellants. With him on the briefs were Robert E. L. Bonaparte and Tooze Marshall Shenker Holloway & Duden, Portland.

Stephen S. Walters, Portland, argued the cause for respondent PacifiCorp. With him on the brief were Charles F. Adams and Stoel Rives Boley Jones & Grey, Portland.

No appearance for respondent Douglas Electric Cooperative.

Before Richardson, Presiding Judge, and Newman and Deits, Judges.

NEWMAN, J.

Affirmed.

4476N FILED: October 25, 1989

NEWMAN, J.

Plaintiffs (Water Power) appeal a judgment for defendant (Pacific) in an action for damages for breach of an electric power purchase agreement.[1] The jury returned a general verdict for Pacific. Water Power makes ten assignments of error challenging the court's giving or refusing to give instructions, its ruling that the Public Utility Commission (PUC) had primary jurisdiction and certain rulings on evidence and damages. We affirm.

The jury could have found that Water Power, a small power producer, wished to build a project on Mill Creek in Douglas County and generate, sell and deliver power to Pacific, a regulated utility. Water Power commenced negotiations with Pacific in late 1982. Pacific notified Water Power, whose production facilities were not

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[1] Water Power asked, in the alternative, for injunctive relief. The court dismissed that claim, and that action is not included in this appeal.

connected to Pacific's electric power grid,[2] that, before it would execute a power purchase agreement, it would require a "wheeling" or transmission agreement that would detail how Water Power would send power from Mill Creek to Pacific's grid.

Pacific buys power according to an avoided cost schedule that is subject to approval by PUC.[3] In August, 1983, PUC approved a new schedule with lower rates than the 1982 schedule. Pacific notified Water Power that a power purchase agreement executed after September 30, 1983, would use the lower rates.

Water Power could deliver its power to Pacific at several locations, including Cottage Grove, in Lane County, and Fairview, in Coos County. In either case, Water Power would have to send its power over lines of the Bonneville Power Administration (BPA) and the Douglas Electric Cooperative, Inc. (Douglas).[4] Douglas's lines run

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[2] An electric power grid is a network of conductors for the distribution of electric power.

[3] An electric utility must purchase power from a small power producer at a rate no lower than its avoided cost, that is, "the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source." 18 CFR § 292.101(6); *see* ORS 758.505(1). The utility is required to forecast its avoided costs every two years, and the avoided cost schedules then serve to determine purchase rates from qualifying facilities. 18 CFR § 292.302(b); ORS 758.525(1) and (2).

[4] Pacific named Douglas as a third-party defendant but later withdrew that complaint. The judgment dismissed the complaint against Douglas.

from Mill Creek to BPA's system, BPA lines connect with Pacific's grid at several points. Accordingly, it was necessary that Douglas, BPA, Water Power and Pacific all be parties to a transmission agreement. Both BPA and Douglas had expressed their willingness to do so.

To take advantage of Pacific's higher 1982 purchase rates, Water Power proposed a power purchase agreement at the 1982 rates with a provision that, unless a transmission agreement were executed by a certain date, Pacific could terminate the agreement. Pacific rejected the proposal. In October, 1983, Water Power asked PUC, as an arbitrator, *former* OAR 860-29-005(3), to decide whether Pacific was required to sign a power purchase agreement at 1982 rates. PUC ruled that Pacific had to sign a power purchase agreement at 1982 rates, if Water Power would submit a written plan for transmitting power to Pacific's grid. In December, 1983, Water Power submitted a plan to use the systems of BPA and Douglas to deliver its power to Pacific at Cottage Grove.

On June 5, 1984, Pacific expressed a willingness to execute a power purchase agreement under which Water Power would have until December 31, 1984, to obtain a transmission agreement executed by Water Power, Pacific, Douglas and BPA. Pacific and Water Power disagreed, however, about the point of delivery. Pacific wanted Cottage Grove; Water Power wanted to leave the point of delivery open. On August 17, 1984, the parties asked PUC to decide that dispute. It ruled that Pacific could require that Cottage Grove be the point of delivery, but that the deadline for completion of the transmission agreement would be November 1, 1985.

Water Power and Pacific executed the power purchase agreement on November 28, 1984, and PUC approved it. Article II of the agreement provides:

> "This Agreement shall not become effective until Sellers, Utility, BPA, and Pacific have entered into the Transmission Agreement providing for firm transmission of electric power from the Facility to Pacific's system pursuant to, and under the constraints contained in, Article IX; *provided*, that if the Transmission Agreement has not been executed by all four parties prior to November 1, 1985, or if the Transmission Agreement has not been approved by the Rural Electrification Administration prior to November 1, 1986, this Agreement shall be null and void." (Emphasis in original.)

Article I defines "Point of Delivery" as

> "the location where Net Delivered Output is delivered to Pacific's system at BPA's Cottage Grove Substation, as specified in the Transmission Agreement, or at such other location as may reasonably be required by Pacific to allow Pacific to accept Net Delivered Output from BPA."

Article XVII provides, in part:

> "As used in this Agreement, 'Force Majeure' means unforeseeable causes beyond the reasonable control of and without the fault or negligence of the party claiming Force Majeure."

BPA distributed a draft transmission agreement to Douglas, Pacific, and Water Power on October 10, 1984. Pacific responded with comments in June, 1985. The parties continued to disagree about the point of delivery. Water Power wanted Fairview as the primary point of delivery; Pacific wanted it only as a backup point to

Cottage Grove. They referred the dispute to PUC. On October 7, 1985, PUC ruled that Pacific's position was reasonable in terms of its needs and consistent with the power purchase agreement.

On October 22, 1985, BPA circulated another draft of a transmission agreement with new provisions. Pacific telephoned BPA on October 25, hand-delivered a marked-up copy of the draft to BPA on October 28, and sent it a letter, dated October 30, discussing its concerns about the new provisions. Pacific stated that it wanted Cottage Grove as the point of delivery. The letter ended with an assurance that "Pacific is willing to discuss the resolution of these issues to achieve an acceptable agreement within the time-frame stated in the Power Purchase Agreement." BPA responded to Pacific on February 28, 1986. It rejected Cottage Grove as the point of delivery and suggested its Alvey substation instead.

On November 12, 1985, Water Power notified Pacific that it had been willing to sign the BPA draft transmission agreement of October 21, 1985, with one change in the environmental review provision, and that the condition in the power purchase agreement that required a transmission agreement by November 1, 1985, should be excused under the force majeure article, because Water Power had no control over the other three parties. Pacific replied on December 13, 1985, that, under Article II, the power purchase agreement was null and void, because the transmission agreement had not been executed by the four parties by November 1, 1985. On July 14, 1986, Water Power brought this action.

Water Power assigns as errors that the court instructed the jury, in substance, that Pacific (1) was not required to enter into a transmission agreement that it reasonably believed was not in its best interests; and (2) had a right to insist that the transmission agreement designate Cottage Grove as the point of delivery. Water Power argues that the federal Public Utilities [sic] Regulatory Policy [sic] Act (PURPA), 16 USC § 824a-3, imposes on Pacific a statutory obligation to purchase electric power from it and that Pacific's best interests, or preference as to a delivery point, are irrelevant.

Water Power relies on *Snow Mt. Pine Company v. Maudlin*, 84 Or App 590, 734 P2d 1366, *rev den* 303 Or 591 (1987), and asserts that "the obligation to purchase power is imposed by law on a utility; it is not voluntarily assumed." 84 Or App at 599. In *Snow Mt. Pine*, we also said that a utility's obligation "is created by statutes, regulations and administrative rules." 84 Or App at 598. Those statutes, regulations and rules require a utility to *offer* to purchase power from a qualifying facility, which includes a small power producer. The utility, however, is not required to purchase in any and all events and may insist on provisions that require that a transmission agreement be signed by a certain date and designate a particular point of delivery.

Congress enacted PURPA in 1978, in part to encourage qualifying facilities to produce electric energy. The legislation directs the Federal Energy Regulatory Commission (FERC) to promulgate regulations to require electric utilities "to offer to * * * purchase electric energy" from qualifying facilities, 16 USC § 824a-3(a), and to ensure that the rates that the qualifying facility charges

the electric utility are fair both to the qualifying facility and to the ultimate consumer. 16 USC § 824a-3(b). Other provisions of PURPA cover rates for the sale of electric energy to and from qualifying facilities, the implementation and enforcement of the regulations and several exemptions therefrom.

FERC has promulgated rules that implement PURPA. 18 CFR Part 292. 18 CFR § 292.301 provides:

> "(a) *Applicability.* This subpart applies to the regulation of sales and purchases between qualifying facilities and electric utilities.
>
> "(b) *Negotiated rates or terms.* Nothing in this subpart:
>
> "(1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, *or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart;* or
>
> "(2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase." (Emphasis supplied.)

PURPA also requires state regulatory agencies to enforce its provisions. 16 USC § 824a-3(f)(1). Oregon has enacted legislation governing small power producers and has administrative rules that parallel PURPA and its regulations. ORS 758.505 *et seq*; OAR 860-29-001 *et seq*.[5] Under

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[5] ORS 758.515(2) states that its goal, like the goal of PURPA, is to:

> "(a) Promote the development of a diverse array of permanently sustainable energy resources using the

(Continued on following page)

the federal statute and regulations and the state statute and rules, therefore, the parties may agree on terms or conditions in a power purchase agreement that vary from what is set forth in the regulations and rules.[6] It follows that the parties may also make contractual provisions on matters that the regulations and rules do not cover.

Nothing in *Snow Mt. Pine* is to the contrary. There the issues were *when* a utility's obligation to purchase power

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(Continued from previous page)

> public and private sectors to the highest degree possible; and
>
> "(b) Insure that rates for purchases by an electric utility from, and rates for sales to, a qualifying facility shall over the term of a contract be just and reasonable to the electric consumers of the electric utility, the qualifying facility and in the public interest."

PUC's rules provide:

> "Nothing in these rules limits the authority of a public utility or qualifying facility to agree to a rate for any purchase, *or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be provided by these rules,* provided such rates or terms do not burden ratepayers of the utility." OAR 860-29-005(2). (Emphasis supplied.)

Water Power does not assert that it has any greater rights under the state statute and rules than under PURPA and its regulations.

[6] FERC's comments confirm that the regulation conforms to PURPA. "Agreements between an electric utility and a * * * small power producer for purchases * * * under terms or conditions different from those set forth in these rules, do not violate the Commission's rules under section 210 of PURPA." 45 Fed Reg 12217.

arises and *what* purchase rates apply, matters that the regulations and rules covered. The statutes, regulations and rules, on the other hand, do not cover the location of points of delivery or deadlines for transmission agreements. Accordingly, the power purchase agreement could provide for Cottage Grove as the point of delivery and a November 1, 1985, deadline for execution of the transmission agreement. The challenged jury instructions are consistent with our conclusion and giving them was not erroneous.

Water Power also assigns as errors that the court instructed the jury that (1) it must find for Pacific if, irrespective of its motives and actions, no transmission agreement would have been executed by November 1, 1985, and (2) Water Power had the burden of proving that Pacific deliberately refused to enter into a transmission agreement for the *sole* purpose of voiding the power purchase agreement. From the evidence, the jury could have found that, independently of any actions, motives or purposes of Pacific, BPA refused to sign a transmission agreement that designated Cottage Grove as the delivery point either by November 1, 1985, or after that date. Pacific's motives, actions, purposes or sole purpose in not signing the transmission agreement by November 1, 1985, are, therefore, irrelevant in view of BPA's refusal to sign. The instruction respecting Pacific's motives and actions was not erroneous. The instruction respecting Water Power's burden of proof as to Pacific's purpose, if it was error as to any party, was harmless as to Water Power.

Water Power assigns as error that the court refused to give plaintiffs' requested force majeure instruction. Article II of the power purchase agreement, however,

contemplates the possibility that the transmission agreement would not be executed by the four parties by November 1, 1985, and provides that, in that event, the agreement is null and void. Failure to sign a transmission agreement before that date was not "unforeseeable" within the meaning of Article XVII. The court did not err in refusing that instruction.

The court also did not err when it refused to give Water Power's requested instructions relating to statutory treble damages. *See former* ORS 756.185.[7] Water Power was not entitled to treble damages unless the jury had awarded Water Power general damages. The jury awarded no damages. The court's failure to give the requested instruction, even assuming that was error, was harmless.

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[7] *Former* ORS 756.185 (since amended to include telecommunications utilities but otherwise identical) provides:

> "(1) Any public utility, railroad, air carrier or motor carrier which does, or causes or permits to be done, any matter, act or thing prohibited by ORS chapter 756, 757, 758, 760, 761, 763, 764, 767 or 773 or omits to do any act, matter or thing required to be done by such statutes, is liable to the person injured thereby in the amount of damages sustained in consequence of such violation. If the party seeking damages alleges and proves that the wrong or omission was the result of gross negligence or wilful misconduct, the public utility, railroad, air carrier or motor carrier is liable to the person injured thereby in treble the amount of damages sustained in consequence of the violation. If damages are awarded, the court may also fix and award reasonable attorney fees at trial and on appeal."

We interpret two additional assignments of error to be that the court erred when it refused to allow the jury to consider as part of Water Power's damages an item described in the testimony of Wolverton, one of Water Power's witnesses,[8] and when it refused to submit to the jury Water Power's requested instructions respecting those "damages." Wolverton testified that Water Power, as general partner, planned to form a limited partnership to operate the Mill Creek facility. Wolverton testified that

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[8] Water Power's assignment of error regarding Mr. Wolverton reads:

> "The trial court erred in allowing defendant's motion for a directed verdict on the question of damages with respect to Mr. Wolverton's testimony:
>
> 'At the end of the plaintiffs' case, I allowed the defendant's motion for a directed verdict on the question of damages with respect to the damages testified by Mr. Wolverton of somewheres between $8.2 and $14.2 million. The basis of that ruling was that Mr. Wolverton's entire testimony – and this becomes even clearer even though when you examine Exhibit 472, which is not part of the record but which was his report, and I assume if asked the right questions would answer as to the matter in his report that if the damages which he was referring to were the damages that would be the lost profits that would be received by the investors in this project as limited partners are not necessarily the damages of Water Power Company, Inc. or Mr. Baker.
>
> 'Upon further – as I understand Mr. Wolverton's basic testimony, though, and the intention of the party – of the plaintiffs was to create a partnership in which Water Power Company, Inc., someone was going to be a general partner and they would sell limited partnership interest.' "

the limited partners would lose profits if Pacific succeeded in voiding the power purchase agreement. Water Power asked that the jury consider those lost profits as an item of damages. The persons who would have been limited partners, however, are not parties to this action, and any loss of profits that they might have suffered because Pacific terminated the power purchase agreement could not be damages to Water Power. The assignments of error are without merit.

Finally, Water Power assigns as errors several of the court's rulings excluding evidence. It offered the testimony of a former BPA employe about conversations with other BPA employes concerning Pacific's motives in refusing to change the point of delivery from Cottage Grove. The court excluded it. We have already decided that Pacific had a right to insist on Cottage Grove as a point of delivery and that its motives are irrelevant.

Although the court admitted in evidence a letter from Water Power's attorney to Pacific's attorney, dated December 23, 1985, it excluded two affidavits and notes of a meeting on the transmission agreement that were attached to the letter. Water Power urged the court to admit the material on the ground that it provided a context for the letter. The court also refused to admit two letters, dated September 18 and 19, 1986, one from a Pacific employe and one from a BPA employe, discussing the timing of separating certain Pacific and Emerald People's Utility District systems. In each instance, the court did not abuse its discretion.

The court also refused to admit testimony of Water Power's employe about negotiations that he had with a

vice-president of Pacific in March, 1986. The employe would have testified that Pacific's officer proposed that the parties transmit power to Fairview by an alternate transmission line. Even assuming that the testimony would not have been inadmissible under OEC 408,[9] the court did not abuse its discretion in excluding it.[10]

Affirmed.

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[9] OEC 408 provides:

"(1)(a) Evidence of furnishing or offering or promising to furnish, or accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount.

"(b) Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

"(2)(a) Subsection (1) of this section does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations."

[10] Water Power also assigns error to the court's statement that PUC had primary jurisdiction, but it acknowledges that its assignment asserts no reversible error and should be considered only in the event of a retrial. It is unnecessary, therefore, to consider it.

APPENDIX C

Water Power Co., Inc., Plaintiff, v. PacificCorp, Defendant.	)	Multnomah County Circuit Court No. 8607-04185
	)	MEMORANDUM OF THE COURT

I.

INTRODUCTION

Plaintiff's claims were for breach of contract and damages under ORS 758.185. The Court dismissed the statutory claim.

II.

DISMISSAL OF STATUTORY CLAIM – PRIMARY JURISDICTION

Defendant moved to dismiss Plaintiff's statutory claims under ORS 756.185, which in pertinent part provides:

> "Any public utility . . . which does, or causes or permits to be done, any matter, act or thing prohibited by ORS chapter 756, 757, 758, 760, 761, 763, 764, 767 or 773 or omits to do any act, matter or thing required to be done by such statutes, is liable to the person injured thereby in the amount of damages sustained in consequence of such violation. If the party seeking damages alleges and proves that the wrong or omission was the result of gross negligence or

> wilful misconduct, the public utility, railroad, air carrier or motor carrier is liable to the person injured thereby in treble the amount of damages sustained in consequence of the violation."

Plaintiffs allege Defendant violated ORS 758.525(2) which requires an electric utility "shall offer to purchase energy . . . whether delivered directly or indirectly from a qualifying facility" at a price not less than the utility's "avoided costs" at the time the legal obligation to purchase was incurred.

Related statutes provide that the Public Utility Commissioner (PUC) must review and approve "avoided costs" schedules, establish criteria for qualifying facilities and the terms and conditions for the purchase of energy from a qualifying facility. ORS 758.505, 758.525(1), 758.535, 758.545.

Plaintiffs, developers of a hydroelectric project in Douglas County, and the Defendant, a public utility, executed in November 1984 a Power Purchase Agreement (Exhibit 19) to sell Plaintiff's electric power to Defendant. The Agreement provided, among other things, that it was null and void unless an agreement for transmitting the power from the facility to Plaintiff was executed by November 1, 1985, between Plaintiffs, Defendant, Douglas Electric Cooperative, Inc., and Bonneville Power Administration (BPA).

Plaintiffs assert that Defendant deliberately and in bad faith failed to enter the transmission agreement in order to frustrate performance of the Power Purchase Agreement. Plaintiffs claim defendant's conduct constitutes a breach of contract and a violation of ORS 758.525(2).

This Court from the outset is troubled whether this is the appropriate forum for any of Plaintiff's claims. It is apparent from the correspondence between Plaintiff, Defendant and the PUC that the Commissioner directed Defendant against its will to enter into the agreement and mandated the critical terms including price and the deadline for executing a transmission agreement. When that deadline passed, it clearly was in the Commissioner's power to require Defendant to extend the deadline or impose conditions on Defendant which would have ensured execution of a transmission agreement. Indeed, the Public Utility Commissioner offered to intervene and exercise that power by letter to Plaintiff's counsel on March 28, 1986. (Exhibit 256) Plaintiff declined, electing to take its claim to this Court.

The Power Purchase Agreement is hardly a common law contract. The transaction has none of the earmarks of consensuality, but was mandated as part of a pervasive regulatory scheme to promote the utilization of small-scale power projects by public utilities. Questions of interpretation are better answered by looking to the Commissioner's intent rather than the parties. Whether Defendant violated this "agreement" or the statute is a question which initially should be determined by the Commissioner. If the Commissioner finds a violation and is unable to remedy same, then Plaintiff would be entitled to seek relief under ORS 756.185.

This conclusion is buttressed by the role played by the PUC in the subsequent negotiations over a transmission agreement. It is undisputed that the PUC made a continuing offer to resolve any conflicts between Plaintiff

and Defendant regarding the negotiation of the transmission agreement. Plaintiff requested such assistance to resolve a conflict between Plaintiff and Defendant concerning the point of delivery and cost responsibility. By letter dated October 7, 1985 (Exhibit 244) the PUC decided both issues in Defendant's favor. The clear import of the PUC's letter is that he would, if necessary, order Defendant to execute a transmission agreement provided it incorporated the terms he was therein directing. The PUC reasoned that Defendant's position was reasonable and consistent with the express language of the Power Purchase Agreement. The decision constitutes a finding by the PUC that Defendant's position in the transmission agreement negotiations was neither in violation of ORS 758.525 nor in bad faith. The PUC's conclusions are inconsistent with Plaintiff's contention at trial that Defendant was acting in bad faith at all times before and after the PUC's decision on October 7, 1985.

It may be appropriate for this Court to not accept the PUC findings with respect to a common law claim for breach of contract. But such finding precludes this Court from second-guessing the Commissioner in an action under ORS 756.185. If Plaintiff desired to contest the PUC's decision, the appropriate means was through the administrative process and judicial review under ORS Chapter 756.

For the reasons stated, this Court is of the view that primary jurisdiction over this entire dispute is with the PUC. It is interesting to note that Plaintiff has sought specific performance of Power Purchase Agreement as alternative relief. Plaintiff has candidly advised the Court that the purpose of this claim was a concern that its

evidence of damages was insufficient. It is apparent that under ORS 758.505 et seq., the Commissioner could order Defendant to take delivery and purchase of the power on the terms sought by Plaintiff. As stated, the Power Purchase Agreement was not a consensual transaction, but was mandated as part of a pervasive regulatory scheme entirely within the jurisdiction of the PUC.

III.

LIABILITY

A detailed discussion of the evidence in this case is unnecessary. Defendant's motions for a directed verdict at conclusion of Plaintiff's case were denied, but the Court suggested to Defendant's counsel that it would reconsider this issue if a motion for Judgment N.O.V. became appropriate. The jury returned a verdict for Defendant.

This memo is submitted in the event of an appeal. The Court is of the view that Defendant would have been entitled to a Judgment N.O.V. if the jury had returned a verdict in favor of the Plaintiff on two grounds. First, the Court is of the opinion that both the statutory and breach of contract claims should have been dismissed on grounds of primary jurisdiction. Secondly, viewing the evidence most favorably to the Plaintiff, the Court is convinced that a finder of fact could not as a matter of law conclude there was liability.

The Power Purchase Agreement, Exhibit 19, provided that in the event there was not a transmission agreement between Plaintiff, Defendant, Douglas Electric Coop. Inc.

and BPA by November 1, 1985, the contract was null and void. Plaintiff contends that Defendant breached the covenant of good faith in performance on the theory that throughout the negotiations from August 31, 1984, the date of the Power Purchase Agreement, until November 1, 1985, Defendant had no intention of ever entering into a transmission agreement, and deliberately negotiated in a manner which ensured that a transmission agreement would not be consummated. There is evidence to support Plaintiff's contentions that for economic reasons PacifiCorp did not desire to have the power purchase agreement go into effect. There is also evidence that prior to September 5, 1985, in the proposed Transmission Agreement negotiations, Defendant waivered between Cottage Grove and Fairview as the point of delivery. However, subsequent to that date, there is no dispute Defendant consistently insisted on Cottage Grove as the point of delivery with excess load delivery to Fairview. Defendant also insisted on contract language to protect it in the event its service territory in Cottage Grove was condemned. This position was incorporated into Inserts 1 and 2 submitted to the parties and specifically approved by the PUC. See Exhibits 35 and 4. Defendant had a legal right to insist on the Inserts 1 and 2 designations of point of delivery, and as a matter of law it was not bad faith to insist on such designations. BPA rejected these inserts and instead proposed delivery to be divided equally between Cottage Grove and Fairview. There is no evidence that Bonneville thereafter communicated that it would accept Defendant's proposal. To the contrary, the only evidence of a subsequent communication was a BPA letter sent in February 1986 proposing a wholly different

point of delivery. The only conclusion that can be drawn from this evidence is that BPA would not accept the delivery points which Defendant as a matter of law had a right to insist upon.

The failure of the parties to execute a transmission agreement was due to lack of agreement, not bad faith by Defendant.

[Johnson, J.]

APPENDIX D

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF UMATILLA

JAMES and JANET BOYD, husband and wife; and DENNIS LOGAN,	)	No. CV 87-414
Plaintiffs,	)	
v.	)	
PACIFICORP, a Maine corporation, dba PACIFIC POWER & LIGHT COMPANY,	)	
Defendants.	)	

Excerpt From
LEGAL MATTERS TRANSCRIPT
Cassette No. CV89-543, Side 2

* * *

I am of the opinion the plaintiff does have a private right of action if they can prove the necessary elements to entitle them to damages. I think the policy of the statute would be totally frustrated if it could be avoided simply by entering into the power purchase agreement. It seems to me if there is an obligation to furnish power there is an obligation not only to offer to buy it, but to buy it. So I think they are entitled to it, if they can prove the elements. First motion is denied. Second motion is to dismiss the claim for punitive damages.

APPENDIX E

Excerpt From The Economist 25
(Oct. 28, 1989)

WASHINGTON DC

THE secretary of energy in the Bush cabinet is doing something rather unusual for a politician. Admiral James Watkins is going around the country, listening. Just listening. In city after city he holds hearings to which experts and members of the public come to testify. After a year and a half of this, he will deliver to his boss an "energy strategy"; something America has never had before.

A cabinet secretary with an open mind has the same effect on lobbyists as a fleshy postman on a pack of dogs. From all sides interested parties are marshalling their arguments to get a piece of the strategy. It is a paradoxical time for the energy industry. Oil is cheap, gas is plentiful, electricity is in surplus. This is no time to cry "scarcity" and be believed. But try opening a new power station in California or persuading investors to let you drill an oil well in Texas.

The alarmists, who have been predicting a new energy crisis for years, have to make a subtler argument, starting from one of two correct premises. The first is that America is becoming increasingly dependent on imported oil which, as other reserves empty, comes increasingly from four OPEC countries in the Gulf. Oil imports exceeded domestic production this year for the first time since 1977. Last year oil companies pumped up twice as much oil from the ground as they found in new fields.

The strategic petroleum reserve, a series of oil-filled salt caverns in Texas and Louisiana, is filling at the rate of

22m barrels a year, but shrinking when measured in the days of imports it could replace. An oil-price increase, which could boost domestic oil exploration, is not imminent. America is running out of oil; the world is not.

The other correct premise is that nobody is clear where the next generation's extra electricity is coming from. The electricity industry is riding an elongated wave of boom and bust. Having predicted limitless growth in demand in the 1970s, it ordered too many new power stations. When demand flattened out in the 1980s, it cancelled them. Now demand is picking up again, but supply is not.

According to the North American Electric Reliability Council, utility companies have been underestimating demand for several years. In the hot summer of 1988, peak demand was nearly 6% above forecasts. Voltage was reduced in the north-east on several occasions. Yet, even if their present forecasts prove reliable, peak demand will regularly exceed capacity after 1996. The north-east will need new capacity by 1993. The east-central region will lose 9,000 megawatts of existing capacity in the 1990s if the Clean Air Act is passed by Congress.

The utility industry foresees the coming shortage of electricity, but cannot easily see what to do about it.

* * *

To make up the coming shortfall, California and New England will rely on imports from Canada and the north-west, especially of cheap natural gas and hydroelectric power. But sources of imports are shrinking. Hydro-Quebec, under pressure from Canadians who do not see

why their rivers should be dammed to send power to Americans, has given notice that further sales will cease by the end of the 1990s. BC Hydro in British Columbia sees no hope of building more dams. The north-west, whose spare capacity once reached 2,800 megawatts, is now temporarily in deficit thanks to the thriving aluminium industry. Vigorous drives for energy conservation may postpone the looming shortages, but only if aided by price rises.

* * *

Ten years ago, when the Energy Department was young, many people were predicting that alternative energy would be competitive by the 1990s. America now gets a little more than 5,000 megawatts (0.7%) from alternative sources and most of that comes from geothermal (hot springs), a relatively mature technology, and biomass – waste of various kinds. The reason for the failure of alternative energy lies partly with physics – the capital costs of solar power have failed to fall – and partly with policy. Federal money for alternative energy research shrank from more than $600m a year to less than $200m during the Reagan years, when the Energy Department became no more than a maker of nuclear weapons and star-wars devices. Meanwhile, tax incentives for wind power blew away.

More important, a law that had encouraged entrepreneurs to explore alternative energy has lost its teeth. This was the Public Utility Regulatory Policies Act (PURPA), which forced utilities to buy power from independent producers at the "avoided cost"; the cost the utility company would incur to generate the same amount of power.

The California Energy company provides an example of how PURPA was supposed to work. Neither utilities nor oil companies had the expertise or interest to develop geothermal power. Mr Charles Condy, the founder of California Energy, put together a company of geothermal experts with the money that PURPA's guaranteed contracts could attract and bought the right to explore 400,000 acres of land.

California Energy is now a thriving $400m public company making fat profits. Its 240-megawatt geothermal power plant at Coso in California (soon to be almost trebled in capacity) generates electricity at a competitive six cents a kilowatt-hour; and its fuel, hot water tapped from beneath the ground and reinjected nearby, does not fluctuate in price. The federal government says 40,000 megawatts of geothermal power lie beneath the western states waiting to be tapped, enough to supply double those states' annual consumption. California's state energy commission agrees that geothermal power may prove the cheapest and most abundant in the state. But the entry barriers are high – Coso cost $615m before it yielded power – and the advantages are no longer in place. In 1985 California's government placed a moratorium on the issue of PURPA contracts of the kind used at Coso.

More than half of America's alternative generating capacity is in California. But other states have similarly weakened the law's application, under pressure from utilities that disliked the idea of being forced to accept electricity from others at a time of surplus. The order book for new alternative-energy plants is drying up. The energy crunch of the 1990s – and the renewed impetus it may give to alternatives – will not be brought on by the

scarcity or costs of fossil fuel but by its dirtiness and its local unpopularity.

* * *

APPENDIX F

Excerpt From The New Republic 13
(Nov. 27, 1989)

Running On Empty
By Morton Kondracke

You thought that energy was a problem of the '70s swept away forever with the breaking of OPEC unity, the end of gas lines, the arrival of fuel-efficient cars, and the return of 95-cent-per-gallon gasoline. Sorry. We've been enjoying only a respite, and we haven't used it very well to prepare for the next time. Energy experts now widely agree that unless the country acts fast, in four to six years "the problem" will be back: the United States will be excessively dependent on Persian Gulf suppliers, OPEC once again will control a tight market, and prices will soar, causing stagflation in industrialized economies and bringing new misery to the Third World.

The warning signs are evident: in July 1988, for the first time, the United States got more than half of its oil from foreign sources. (In 1973, when the Arabs imposed an oil embargo and the OPEC cartel first quadrupled oil prices, the United States was 33 percent dependent.) Production from the continental United States has been declining since 1971, and the North Sea and most other non-Gulf sources also are declining as potential providers of new oil.

Meanwhile, at a time of renewed environmental activism and concern about global warming, there will be resistance – some legitimate, some reflexive – to exploitation of coal, nuclear power, and other alternative energy sources. A new U.S. Government report indicates that within ten years only four countries (Saudi Arabia, Iraq, the United States Arab Emirates, and Kuwait) will have

enough production capacity to satisfy rising world demand – that is, to set prices. Right now the price of oil is relatively low, $19.50 per barrel (the 1979 peak was $40), but except for filling up a 90-day strategic petroleum reserve, the United States has been doing little to protect itself against a new price rise or supply cutoff.

The Bush Administration, to its credit, is aware of the danger, and the Department of Energy is working on a national strategy that officials claim will make balanced use of all available energy sources in order to provide the country with the power it needs, at a price it can afford, while protecting the environment and U.S. national security interests. Administration officials say that the nation has had energy "policies" before (Jimmy Carter's was too government-managed, they say, and Ronald Reagan's was too laissez-faire) but has never had a real strategy based on an agreed data base and a political consensus. That, they say, is what the President has charged Energy Secretary James Watkins to come up with.

The problem, as Bush's critics see it, is that the strategy won't be delivered to the President until December 1990 or announced until January 1991 (in the State of the Union address), and therefore probably couldn't be enacted during Bush's first term. They also fear it will not be adequately coordinated, with separate (and possibly conflicting) transportation and environmental strategies being worked on elsewhere in the Administration, and will likely be chewed up in Congress's disorganized policy grinder. The result, according to Jessica Tuchman Mathews, a former Carter national security aside now with the World Resources Institute, will be "a continued lack of energy policy, another round of OPEC price rises

in the early or mid-1990s – this time, if OPEC is smart, not so dramatic as to induce strong conservation measures – and a fiscal hemorrhage."

* * *

APPENDIX G

Excerpt From Energy Policy 370
(Aug. 1989)

This paper examines the role of the 1978 federal Public Utilities [sic] Regulatory Policies Act (PURPA) in shaping the economic feasibility and regional distribution of waste-to-energy plants (WEPs) in the USA. PURPA marked a watershed in US energy policy by mandating private utilities to purchase electricity produced by small generators. This mandate, together with widespread exhaustion of municipal solid waste landfills, enhances the attractiveness of WEPs as both an energy source and a waste management option. PURPA rules and rates vary widely both across and within states according to the allowance of generating capacity credits, as well as a utility's fuel mix, excess capacity, and load growth. In general, environmental imperatives and high avoided-costs of alternative power production options have led developers principally to Northeast and Southern locations. In the next decade, county and municipal governments pressed by landfill exhaustion will likely be forced to settle for high disposal, or tipping, fees to offset stable or declining fuel and capacity credits. Developers, in turn, will be drawn to areas where PURPA rules and rates will most insulate WEPs from conventional fuel price swings that have undermined the revenue projections of many recent projects.

* * *

APPENDIX H

Excerpt From Hydro Review 8
(Feb. 1990)

Last fall, the Federal Energy Regulatory Commission granted a license to the Eugene (Oregon) Water and Electric Board for the construction of a 14.65 MW hydroelectric project on the Corps of Engineers' Blue River reservoir in Lane County, Oregon. The National Marine Fisheries Service vigorously intervened in the licensing process with repeated study demands and fishery recommendations. Had it achieved its demands, the project likely would have been killed. Apparently, the NMFS employed tactics based on an "end-justifies-the-means" philosophy. But, in doing so, it severely failed its responsibilities as a public agency.

FERC Commissioner Charles A. Trabandt felt so strongly about the NMFS's abuse of its prerogatives that he wrote a separate opinion supporting the action of the Commission of which he is a member. Commissioner Trabandt's opinion is important for several reasons. First he establishes the broad rationale as to why hydroelectric development is important to the U.S. as a whole. Second he censures the NMFS for its repugnant behavior in the Blue River project proceeding. Finally, he calls for – and commits himself to – continued vigilance in behalf of beneficial hydro projects. Highlights from Commissioner Trabandt's concurring opinion follow.

"Oil imports are rising rapidly again toward the 50% dependency level. Electrical demand projections are outstripping existing and planned capacity in some regions of the country. Domestic and international concern about

global warming may lead to further restrictions on the use of fossil fuels . . . .

"In the face of these important factors, hydroelectric power is a clean, domestic, reliable, renewable and cost-effective source of electric generation for the nation. It is becoming increasingly apparent that the United States is going to need every possible MW from responsible hydroelectric generation in the decades ahead. Also, it is quite conceivable that Congress will once again decide to support that result with various incentives. But, in the meantime, it is imperative that the Commission's licensing process support as much responsible development today as possible and, at the same time, avoid creating any further regulatory disincentive to future hydroelectric development.

* * *

"In conclusion, for this Commissioner, the NMFS cards on the table in this case are as clear and unambiguous as clubs, diamonds, hearts and spades and, when it is all said and done in this case, the Commission must not accede to the NMFS efforts to cripple or kill this project. Consequently, I urge my colleagues and the Commission staff to remain diligent in our efforts to preserve the significant net benefits of the project in the face of any further attack by NMFS under the rubric of Section 18. I also want to assure more generally all those still committed to a hydroelectric option for this nation that I am confident of continued vigilance in these efforts in future cases."

* * *

APPENDIX I

Excerpt From Public Utilities Fortnightly 56
(Sept. 14, 1989)

Cogeneration is an interesting story about a technology from the 1920s, a federal law from the 1970s, and how in combination they may cost customers of Public Service Company of Oklahoma (PSO) $300 million in the 1990s.

PSO is not, repeat *not*, anticogeneration. After all, cogeneration, which is simply the simultaneous production of steam and electricity, makes perfect sense when it conserves energy *and* results in lower costs for both industrial steam users and electric customers.

In some ways, a cogeneration plant is like a car. A car engine is about 30 to 35 percent efficient in converting gasoline to motion, but some of the waste heat is used to warm the car. Similarly, a cogeneration plant converts come of the unutilized energy from a power plant into steam, which has value to industry.

Cogeneration is nothing new. The basic technology has been around since the turn of the century. If you need both electricity and steam, a well-designed "cogen" plant can produce both with high efficiency.

One such plant is the Mid-Continent Power Company facility at the industrial park in Pryor, Oklahoma. PSO recently signed an agreement to buy cogenerated electricity from Mid-Continent at less than three cents a kilowatt-hour. That's a fair price, as low or lower than the cost of electricity at PSO natural gas plants that don't cogenerate. Mid-Continent is able to offer this price to PSO because it will be selling balanced amounts of both electricity and steam, thereby making the most economic

use of the energy input. As a result the Mid-Continent contract is expected to save PSO customers $60 million over the next 20 years, and provide economically priced steam service to several industries as well.

In other words, "cogen" *can* make good business sense if it's done right and it can save energy too. Back in 1978, during the energy crisis, it seemed like such a good idea to Washington that Congress passed a law. Operating under this legislation – the Public Utility Regulatory Policies Act, or PURPA – cogeneration developers have made a lot of money off of electric customers with very small energy savings.

PURPA offers a range of federal entitlements to encourage alternative energy sources: solar, wind, small hydroelectric plants, and cogen – especially cogen. The law gives cogeneration developers freedom from regulation that applies to other electricity producers. It also requires the local utility to buy cogeneration electricity. This is a *requirement*. As long as a plant fits the definition of "cogenerator," the local electric utility is forced by law to buy its electricity, *whether the utility needs it or not*, at the cost the utility avoids by not having to generate the electricity itself.

* * *

(2)

No. 89-1683

Supreme Court, U.S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1989

WATER POWER COMPANY, INC., *et al.*
Petitioners,

v.

PACIFICORP, *et al.*
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE OREGON COURT OF APPEALS

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QUESTION PRESENTED

Petitioners' statement of the question presented mischaracterizes the nature of this appeal. Respondent presents its own statement:

1. Do the Public Utilities Regulatory Policy Act (PURPA) and its implementing regulations authorize parties to agree to and to enforce terms such as those proposed by petitioners and adopted in the Purchase Power Agreement here?

PARTIES TO THE PROCEEDING

Petitioners' statement of the parties should be supplemented as indicated below.

Respondent PacifiCorp affiliates include Pacific Telecom, Inc., NERCO, Inc., Equitec Financial Group, Inc., EyeDentify, Inc., Flight Dynamics, Inc., and Arnav Systems, Inc.

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JURISDICTION

Respondent accepts petitioners' statement of the opinions below and jurisdiction.

STATUTORY PROVISIONS

Petitioners' citation of relevant statutory and regulatory provisions is incomplete and should be supplemented as indicated below.

Section 292.301(b)(2) of the Federal Energy Regulatory Commission's (FERC) regulations provides:

> "(b) *Negotiated rates or terms.* Nothing in this subpart:
>
> * * * * *
>
> "(2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase." 18 CFR § 292.301(b)(2) (1989).

STATEMENT OF THE CASE

The facts are correctly stated in the opinion of the Oregon Court of Appeals. *Water Power Company, Inc. v. PacifiCorp*, 99 Or App 127, 127-130, 781 P2d 860 (1989). Petitioners' statement of the case is materially incomplete. The most significant of the facts omitted by petitioners concerns their role in initiating the contract they are attempting to avoid and the indispensability of that contract to petitioners' claim to 1982 prices.

At the time petitioners and respondent were exploring the proposed project in 1983, changes were occurring in the price respondent was required to pay for power purchased from qualifying facilities under PURPA. (Ex 8; Tr II, 404-05.) That price was determined by respondent's "avoided costs," which fluctuated depending upon projections of respondent's future power needs. Respondent notified all qualifying facilities with which it was negotiating in August 1983 (including petitioners) that power purchase agreements signed after September 30 would contain prices based on new, lower avoided costs approved by the Oregon Public Utilities Commission ("OPUC"). (Ex 206; Tr III, 521-23.)

Petitioners were eager to enter a power purchase agreement as soon as possible in order to lock in the higher prices before they expired. (Ex 207; Tr III, 525-26; Tr IV, 657, 697.) Their principal problem was that the project would be located some distance from respondent's electric utility system, so that petitioners were required to negotiate with other utilities to transmit the power to respondent. Petitioners therefore proposed a contract with a provision that "each of these project components [license, Interconnection Agreement, and Transmission Agreement] must be completed by a time certain or [respondent] may terminate the agreement." (Ex 207; Tr III, 526; Tr IV, 623.) Shortly after the September 30, 1983 deadline, OPUC was

asked to determine whether respondent was required to sign a power purchase agreement with the 1982 avoided cost prices. (Tr III, 530.)

OPUC ordered respondent to negotiate a power purchase agreement with the expired 1982 prices, provided that petitioners first identify in writing a plan for transmitting the power to respondent's system. (Ex 210; Tr II, 405; Tr III, 531-32.) Petitioners subsequently specified in late 1983 a transmission path through lines owned by Douglas Electric Cooperative and BPA, with the point of delivery to respondent at Cottage Grove, Oregon. (Ex 211; Tr III, 532-33.) In mid-1984, however, petitioners concluded they could save money by delivering power not at Cottage Grove, but instead at Fairview. (Tr IV, 757-58.)

Respondent acknowledged that Fairview might be a feasible point of delivery, but insisted that Cottage Grove remain as the principal delivery point. (Tr VI, 950-51.) Petitioners requested OPUC to order respondent to sign a power purchase agreement with the point of delivery left for designation in a later executed transmission agreement. (Ex 225.) OPUC refused, explaining that its earlier decision to require the higher 1982 prices was specifically based on its understanding that respondent and petitioners had established Cottage Grove as the point of delivery. (Ex 228.)

A final Power Purchase Agreement was signed by petitioners and respondent on November 28, 1984. The agreement provided in Article IX that, as "an express condition," petitioners "shall, pursuant to the transmission agreement, cause BPA to schedule and transfer all Net Delivered Output to Pacific at the Point of Delivery pursuant to the Transmission Agreement." (Ex 19.) Consistent with petitioners' original proposal and with OPUC's ruling, "Point of Delivery" was defined as

> "*** the location where Net Delivered Output is delivered to Pacific's system at BPA's Cottage Grove Substation, as specified in the Transmission Agreement, or at such other location as may reasonably be required by Pacific to allow Pacific to accept Net Delivered Output from BPA." (Ex 19.)

Similarly, the Power Purchase Agreement incorporated the petitioners' proposal, endorsed by OPUC, with respect to the timing of a transmission agreement meeting these requirements:

> "This Agreement shall not become effective until Sellers [Petitioners], Utility [Douglas], BPA, and Pacific have entered into the Transmission Agreement providing for firm transmission of electric power from the Facility to Pacific's system pursuant to, and under the constraints contained in, Article IX; *provided*, that if the Transmission Agreement has not been executed by all four parties prior to November 1, 1985, or if the Transmission Agreement has not been approved by the Rural Electrification Administration prior to November 1, 1986, this Agreement shall be null and void." (Ex 19.)

November 1, 1985 came and went without a transmission agreement being executed. Petitioners now seek to avoid the express condition of the contract.

REASONS FOR DENYING THE WRIT

I. Petitioners' Appeal Does Not Raise a Substantial Federal Question.

The Oregon Court of Appeals properly construed and applied the provisions of PURPA. In so doing, the court correctly held that PURPA does not limit the authority of a utility and a qualified facility to "'*** agree to a rate for any purchase, *or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required*'" under PURPA. *Water Power Company, Inc.*, 99 Or App at 131 (emphasis in original) (quoting 18 CFR § 292.301(b)(1)). Because the parties voluntarily entered into a contract governing petitioners' right to sell, and respondent's obligation to purchase, power at expired 1982 avoided cost rates, petitioners' appeal raises nothing more than state contract issues unique to the parties.

A. **PURPA and Its Implementing Regulations Empower Project Sponsors and Utilities to Establish by Contract the Rates, Terms, and Conditions Relating to Purchase.**

Under PURPA and its implementing regulations, the relationship between qualifying facilities and a utility may be left to the regulatory scheme, or may be established by agreement. The regulations not only provide that PURPA does not affect the validity of a contract between a qualifying facility and a utility, but also specifically provide that rates, terms, and conditions may be negotiated which differ from those otherwise required under PURPA. 18 CFR § 292.301(b); *see also Consolidated Edison Co. of New York, Inc. v. Public Service Com'n of New York*, 470 US 1075, 105 S Ct 1831, 85 L Ed 2d 132 (1985) (White, J., dissenting from dismissal of appeal). It was in light of this freedom to contract that the parties entered into the Power Purchase Agreement at issue here. The trial court and Oregon Court of Appeals correctly concluded that the terms of the Power Purchase Agreement control the rights of the parties.

In determining the true nature of this proceeding, it is critical to note that petitioners do not seek simply an agreement by respondent to purchase power from their proposed project. Rather, they seek a specific purchase at rates which expired generally in September 1983. The *only* basis for petitioners' claim to these high 1982 rates is the

terms and conditions agreed to between themselves and respondent in the Power Purchase Agreement.

The contractual nature of petitioners' claim was expressly recognized by OPUC. When petitioners sought to compel respondent to sign a contract with the point of delivery left for later designation, OPUC explained that petitioners' claim to 1982 prices was based entirely on the agreement of the parties that Cottage Grove would be the point of delivery:

> "If Loon Lake [i.e., petitioners] is now proposing to change the contract terms or specifications proposed in its January 30 [sic] letter, it would seem that Loon Lake was not ready to execute a purchase agreement at that time, and that September 1982 prices were inappropriate. Since Pacific is unwilling to agree to a change in the point of delivery, Cottage Grove should remain in the contract as the point of delivery." (Ex 228.)

The subsequent Power Purchase Agreement, which petitioners agreed to, effectuated the OPUC order. Petitioners and respondent specifically agreed that, for 1982 prices to apply, delivery had to be made at Cottage Grove and that petitioners, respondent, Douglas Electric Cooperative, and BPA had to enter a transmission agreement by November 1, 1985, or the Power Purchase Agreement would be null and void.

Petitioners now seek to avoid the contractual condition preventing their enforcement of 1982 rates on the basis that PURPA unconditionally requires respondent

to *purchase* energy from qualified facilities. In this regard, petitioners argue that the Oregon Court of Appeals misinterpreted PURPA to simply require respondent to *offer* to purchase energy. Petitioners' argument not only ignores the provisions of 18 CFR § 292.301(b), but is premised upon a misreading of the Oregon Court of Appeals' decision.

B. **The Oregon Court of Appeals' Accurately Construed and Applied PURPA Through Its Enforcement of the Parties' Contract.**

The error in petitioners' interpretation and application of PURPA is evident in petitioners' contention that the Oregon Court of Appeal's decision is in inherent conflict. Petitioners argue that while the court noted the fact that "[a]n electric utility must *purchase* power from a small power producer," it later held that PURPA regulations and rules require only that a utility *offer* to purchase power. (Petition for Writ of Certiorari, p. 7.) When the court's statements are read in context, it is apparent that the court correctly construed PURPA, recognizing that the obligation to purchase power may be contractually modified. The decision cannot be read to create a substantial federal question. *See Amer. Paper Inst. v. Amer. Elec. Pow. Serv. Corp.*, 461 US 402, 416, 103 S Ct 1921, 76 L Ed 2d 22 (1983) (recognizing qualifying facility and utility's right to negotiate rates).

The Oregon Court of Appeals recognized that "[a]n electric utility must purchase power from a small

power producer *at a rate no lower than its avoided cost* ***." The court's statement, however, was not an unconditional and all-encompassing statement of the law, but rather a means of defining "avoided costs" and a utility's obligation to publish avoided cost forecasts. *See* 99 Or at 127 n.3 (emphasis added).[1]

The Court of Appeals did not hold, however, that the obligation to purchase power may not be contractually modified. In this regard, the court correctly distinguished between the statutory obligation to purchase power and the right to contractually modify the obligation. The court held that "[u]nder the federal statute and regulations *** the parties may agree on terms or conditions in a power

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[1] Footnote 3 of the court's opinion provides in full:

> "An electric utility must purchase power from a small power producer at a rate no lower than its avoided cost, that is, 'the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source.' 18 CFR § 292.101(6); *see* ORS 758.505(1). The utility is required to forecast its avoided costs every two years, and the avoided cost schedules then serve to determine purchase rates from qualifying facilities. 18 CFR § 292.302(b); ORS 758.525(1) and (2)." 99 Or App at 127 n.3.

purchase agreement that vary from what is set forth in the regulations and rules." 99 Or App at 131-32. Further, the court correctly concluded that nothing in the Act prevents the parties from contracting on matters that the regulations and rules do not address, *i.e.*, the location of points of delivery or deadlines for transmission agreements. *Id.* at 132.

The Court of Appeals illustrated the distinction between the statutory obligation to purchase power and the right to contract through its comparison of this case to *Snow Mt. Pine Company v. Maudlin*, 84 Or App 590, 734 P2d 1366 (1987). In *Snow Mountain*, the parties had not been able to agree on contract terms. Consequently, the Court of Appeals considered whether, when the parties have not been able to agree on terms, PURPA and its implementing rules will determine for them if and when purchase will be required. The present case, in contrast, presents for consideration if and when purchase will be

required when the parties *have* agreed on terms.[2] In this context, the Court of Appeals declared:

> "Water Power relies on *Snow Mt. Pine Company v. Maudlin*, 84 Or App 590, 734 P2d 1366, *rev den* 303 Or 591 (1987), and asserts that 'the obligation to purchase power is imposed by law on a utility; it is not voluntarily assumed.' 84 Or App at 599. In *Snow Mt. Pine*, we also said that a utility's obligation 'is created by statutes, regulations and administrative rules.' 84 Or App at 598. Those statutes, regulations and rules require a utility to *offer* to purchase power from a qualifying facility, which includes a small power producer. The utility, however, is not required to purchase in any and all events and may insist on provisions that require that a transmission agreement be signed by a certain date and designate a particular point of delivery." *Water Power*, 99 Or App at 130.

In sum, the Court of Appeals correctly recognized that the parties' Power Purchase Agreement did not evade an obligation to purchase power at 1982 prices. Instead,

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[2] In this regard, petitioners reliance on *Afton Energy, Inc. v. Idaho Power Co.*, 107 Idaho 781, 693 P2d 427 (1984), is misplaced. In that case, the court simply held that a utility may be ordered to enter into a fixed term obligation to purchase power at avoided cost rates calculated at the time of delivery or at the time the obligation to deliver over a specified time is incurred. *Id.* at 433-34. The case does not support the proposition that a small producer is entitled under federal law to *expired* avoided cost rates. *See Empire Lumber v. Washington Water Power*, 114 Idaho 191, 755 P2d 1229 (1987), *cert denied*, 109 S Ct 228 (1988) (PURPA not intended to force utility to enter into contract to purchase power from small producer where location and capacity of proposed plant have yet to be specified).

the contract itself created and--unless certain mutually agreed conditions occurred--provided for the extinguishment of that obligation. When the specified conditions were not satisfied by the date agreed to, petitioners' claim to 1982 prices expired also. Thus, rather than misinterpreting PURPA, the court simply recognized the parties' right to contract as to the terms of any purchase. There is no inherent conflict in the opinion.[3]

C. **The Question Present Is Limited to State Contract Law and Does Not Have Importance Beyond the Parties to This Proceeding.**

Stripped to its essentials, this is an ordinary state breach of contract action. Federal law expressly authorizes utilities and small power producers to contract. Petitioners and respondent agreed to a contract. Petitioners thereafter sought to avoid the contract; respondent sought to, and two courts did, enforce it.

Nothing in this ordinary scenario merits the extraordinary step of United States Supreme Court review. Petitioners remain free to negotiate a new contract with

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[3] By way of footnote, petitioners appear to raise a policy argument that in order to provide developers proper "incentives," utilities should be required to forecast their avoided costs more than two years in advance. (*See* Petition for a Writ of Certiorari, p. 12 n.3.) Because petitioners' argument is in direct conflict with 18 CFR § 292.302(b), requiring utilities to forecast avoided costs every two years, it does not raise a substantial federal question.

respondent for the purchase of power or, absent a contract, to take all steps required to create an obligation to purchase based on PURPA and its regulations. It is apparent that petitioners have not done so because the rates applied would be today's rates and not the contractual avoided cost rate of 1982.

CONCLUSION

For the reasons set forth above, petitioners' Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 89-1683

In The

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October Term, 1989

WATER POWER COMPANY, INC., ET AL.

Petitioners,

v.

PACIFICORP, ET AL.

Respondents.

On Petition For A Writ Of Certiorari
To The Oregon Court Of Appeals

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INTRODUCTION

The defect in the decision below, which misconstrues the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 ("PURPA") to require a utility merely to *offer* to purchase power, is far graver than simple error. If allowed to stand, the decision will block PURPA's goal of increasing the nation's energy independence, thereby damming the tremendous reservoir of untapped domestic energy that PURPA was enacted to unlock.[1] The strained arguments in respondent's opposition brief reflect the difficulty of defending the lower court's attack on PURPA, which legislatively overrides utility resistance to purchasing power from decentralized sources.

A. Respondent's Statement Of The Case Belies Its Resistance To Purchasing Petitioners' Power

Utilities prior to PURPA were unwilling to purchase excess electrical power from small power producers.[2] PURPA forcibly modified the utilities' recalcitrant behavior, but could not change their attitude. Although respondent's statement of the case suggests a congenial exercise

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[1] OPEC's new agreement to limit production and Iraq's recent invasion of Kuwait lend special urgency to the Court's safeguarding American development of alternative energy.

[2] *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 470 U.S. 1075, 1076 (1985) (White, J., dissenting from dismissal of appeal) ("[PURPA] is designed to promote the development of alternative energy resources by overcoming the historical reluctance of electric utilities to purchase power from nontraditional facilities.").

in 1982-83 in which respondent was "exploring the proposed project," (Resp. Br. at 2), and examining its "fluctuat[ing]" avoided costs to determine the price to be paid, in reality respondent had to be dragged kicking and screaming into the project. Tr. IV, 656.[3] Respondent's avoided costs filings in fact were made annually, and were applicable to anyone who had begun negotiations in 1982, as had petitioners. The Oregon Public Utilities Commission ("PUC") regulations so provided, and the PUC so reminded respondent in late 1983. Contemporaneously, respondent's staff generated a memorandum outlining various ways to "kill" PURPA projects. Tr. VIII, 1186-87.[4]

Respondent's insistence on Cottage Grove as the principal point of delivery (Resp. Br. at 3) was the blunt

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[3] Respondent's blithe assertion that "the parties voluntarily entered into a contract" (Resp. Br. at 5) is patently false. Petitioners were constrained repeatedly to enlist the assistance of state regulators to overcome respondent's resistance. *E.g.*, Tr. IV, 631-32.

[4] Respondent's statement of the case is misleading in other respects. For example, the statement that the PUC required petitioners to identify "a plan" for transmitting the power to respondent's system (Resp. Br. at 3) insinuates that petitioners had no idea what kind of project they wanted to build. Substantial engineering already had been done, however, and construction contracts were under way. Tr. II, 363, 382-87, 411-12. The "plan" actually was a reference to the specific engineering design for wheeling the power from one system to another, from Douglas Electric Cooperative ("Douglas"), to Bonneville Power Administration ("Bonneville"), to respondent. That would have to be done whether the point of delivery was Cottage Grove or Fairview.

instrument used for killing petitioners' project. After petitioners had agreed to accept Cottage Grove, respondent attempted to insert Fairview as an alternate point of delivery. Tr. VI, 964-65. Eventually, the PUC approved naming Fairview as an alternate point of delivery. Tr. IV, 723-24. As respondent knew (but petitioners did not), Bonneville was not happy with either Cottage Grove or Fairview. Nevertheless, Bonneville had swallowed its principles and went along with Cottage Grove. Then respondent continued to pick a fight with Bonneville by insisting on Fairview too, knowingly subjecting petitioners to this intramural fight between respondent and Bonneville. Tr. IX, 1352-54. Although Bonneville ultimately acceded to Fairview too in its final draft transmission agreement, respondent still refused to take yes for an answer and quashed the project. Tr. VIIA, 88.

Respondent's quotation from the power purchase agreement (Resp. Br. at 4) (referring to "such other location as may reasonably be required by [respondent] to allow [respondent] to accept Net Delivered Output from [Bonneville]") suggests that respondent had essentially unfettered discretion to determine the point of delivery where it might receive Net Delivered Output. The context, of course, established simply that if there were a physical, engineering requirement that respondent accept the power at a point of delivery other than Cottage Grove, then the project sponsors would need to accommodate that requirement. Respondent had no such physical requirement. Tr. V, 911-12.

B. Respondent's Argument Recasts PURPA As A Paper Tiger

Relying on an out-of-context regulation as its sole supporting authority, respondent posits a two-tiered statutory scheme for PURPA. Resp. Br. at 6. At the first tier (pre-contract), qualifying facilities such as petitioners' fall within the protective mantle of PURPA, and may benefit from congressional intention to promote development of small power production. At the second tier (post-contract), qualifying facilities are adrift at sea, and may obtain no assistance from PURPA's policies and protections.

Respondent's claim that *Snow Mountain Pine Co. v. Maudlin*, 84 Or. App. 590, 734 P.2d 1366, *rev. den.*, 303 Or. 591, 739 P.2d 571 (1987), "illustrated the [pre- and post-contract] distinction" is nonsense. Resp. Br. at 10. To begin with, respondent does not dispute that the parties were subject to PURPA's regulatory scheme, including PUC intercession, even *subsequent* to the signing of the contract. Moreover, the *Snow Mountain* court held that PURPA (to promote energy development) prohibits a utility from engaging in dilatory negotiations with a qualifying facility to avoid entering into a contract. 734 P.2d at 600. *A fortiori* under *Snow Mountain*, once having entered into a PURPA-mandated contract, a utility is prohibited from avoiding it by a contractual dodge.[5]

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[5] Notwithstanding its protestations to the contrary (Resp. Br. at 11), respondent was successful in avoiding its obligation to purchase under both PURPA and the contract. The court below refused to throw petitioners an available force majeure

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Respondent relies on 18 C.F.R. § 292.301(b), which neither expressly nor impliedly creates a two-tiered statutory structure. Rather, that regulation permits a utility and qualifying facility to negotiate rates, terms, and conditions different from what would otherwise be required within the context of *"any purchase." Id.* (Emphasis added). PURPA and its regulations must be read as a whole, and the mandate of PURPA is to encourage small power production, whether pre- or post-contract. 16 U.S.C. § 824a-3. Respondent's tortured reading of 18 C.F.R. § 292.301(b) ignores FERC's recognition that a qualifying facility's ability to negotiate different rates, or terms and conditions, under that section is *"buttressed* by the . . . rights and protections of these rules." 45 Fed. Reg. 12217 (emphasis added).

Respondent's citation of *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York*, 470 U.S. 1075 (1985), as additional authority for its novel statutory construction is misplaced. In that case, Justice White sought to address the question whether a state can require utilities to pay more than full avoided costs "for their *mandatory* purchases," and unequivocally observed that "FERC *requires* utilities to purchase electricity from qualifying facilities." 470 U.S. at 1076 (emphasis added).

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life preserver to rescue that purchase obligation, despite the provision therefor in Article XVII of the power purchase agreement. App. 6a to Petition. As a result, petitioners had no opportunity to be excused from third party conduct beyond their control, behind which respondent hid to evade its purchase obligation.

Respondent's reference to "freedom to contract" (Resp. Br. at 6) as the reason why the parties entered into a power purchase agreement is the sheerest hypocrisy. To begin with, the term appears nowhere in PURPA or its implementing regulations. Further, respondent misconstrues the term. "Freedom of contract" is a constitutional liberty protected by the due process clauses of the fifth and fourteenth amendments. It embraces the right to enter freely into all lawful contracts, but it is not an unlimited right. *See Highland v. Russell Car & Snow Plow Company*, 279 U.S. 253, 261 (1929) ("such liberty is not absolute or universal and . . . Congress may regulate the making *and performance* of such contracts whenever reasonably necessary to effect any of the great purposes for which the national government was created") (emphasis added). Paradoxically for respondent, PURPA is a prime example of a significant limitation on respondent's "freedom of contract." By lawfully requiring respondent to purchase power from petitioners, Congress restricted, rather than preserved, respondent's contractual freedom.[6]

Respondent defends the Oregon Court of Appeals' decision on the ground that it simply sanctions a contractual modification of the obligation to purchase power. Respondent attempts a nice distinction, but in this case

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[6] Respondent misstates that the "only" basis for petitioners' claim to 1982 rates is the terms and conditions of the power purchase agreement. Resp. Br. at 6-7. Petitioners qualify for 1982 rates because they began negotiating in 1982 and the PUC accordingly required respondent to make those rates available to petitioners. Tr. II, 405. Those were the rates that invited petitioners' attention and made reasonable their engineering work.

modification is tantamount to evisceration. The purchase *obligation* was set in PURPA. 16 U.S.C. § 824a-3. FERC rules implement the purchase obligation. 18 C.F.R. § 292.303(a). The *manner* in which the obligation may be performed, however, is set forth in the terms and conditions of the contract. If the result of the application of terms and conditions in a contract is to frustrate a purchase obligation, then that is more than a "contract modification" and forbidden by PURPA. 45 Fed. Reg. 12219 (1980) (the obligation to purchase supersedes contractual restrictions).

Like most litigated PURPA disputes, the controversy below surrounded negotiation on rates.[7] The Oregon Court of Appeals discussed respondent's purchase obligation in the context of a rate dispute. App. 4a to Petition n.3. Read fairly, the Court of Appeals held contrary to PURPA that there is no purchase obligation, just a requirement to offer to purchase. That requires review, not only for its obvious error but also for its substantial importance.

If respondent is permitted to hide behind the contract, which shifts the mechanics of interconnection to a decision by a third party, Bonneville, respondent avoids its duty to interconnect with petitioners, in violation of

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[7] If the state public utilities commission sets a specific rate, and it is not below what FERC mandates, then that state administrative decision cannot be defied by the parties, on their rate negotiations. Otherwise, however, the parties are free to negotiate rates, presumably upwards. *Cf.* 45 Fed. Reg. 12221 ("[T]he States are free, under their own authority, to enact laws or regulations providing for rates which would result in even greater encouragement of these technologies.").

American Paper Institute, Inc. v. American Elec. Power Service Corp., 461 U.S. 402 (1983). In that case the Court unmistakably confirmed a utility's duty to interconnect to accomplish purchases or sales of electricity authorized by PURPA. *Id.* at 419-20. The decision below, to the contrary, however, invites purchasing utilities to engage in dilatory squabbling with a third party, rather than working to resolve the interconnection with a qualifying facility. PURPA's implementing regulations and the decisions of this Court prohibit such a result.

CONCLUSION

The extraordinary scenario of respondent evading its federal purchase obligation and thumbing its nose at PURPA will become all too ordinary an occurrence absent Supreme Court review. For the reasons set forth herein and in petitioners' opening brief, the Court should grant this petition for certiorari.

Respectfully submitted,

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